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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

CITIZENS ASSOCIATION FOR SOUND ENERGY,

Petitioner,

v.

DAVID BOLTZ AND BARBARA BOLTZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Art. 1396-2.23 of the Texas Non-Profit Corporation Act violates the First Amendment of the United States Constitution.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding before the Texas Supreme Court:

1. Citizens Association for Sound Energy (CASE), Defendant in the Trial Court; Appellant in the Court of Appeals for the Seventh Judicial District of Texas at Amarillo; Petitioner in the Texas Supreme Court; and Petitioner in this Court.

   CASE is a non-profit corporation created and existing under the laws of the State of Texas. There is no parent corporation or any subsidiary corporation.

2. David Boltz and Barbara Boltz, Plaintiffs in the Trial Court; Appellees in the Court of Appeals for the Seventh Judicial District of Texas at Amarillo; Respondents in the Texas Supreme Court; and Respondents in this Court.

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OPINIONS AND ORDERS BELOW

The following orders and opinions have been entered by the Courts below:

1. Order Granting Plaintiff's Motion for Summary Judgment entered by the 116th Judicial District Court of Dallas County, Texas in Cause No. 89-8439-F on December 30, 1991. (App. 10-1).

2. Amended Protective Order Regarding Records to be Inspected and/or Copied entered by the 116th Judicial District Court of Dallas County, Texas in Cause No. 89-8439-F on September 30, 1992. (App. 11-1 to 11-3).

3. Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Partial Summary Judgment (Nunc Pro Tunc) entered by the 116th Judicial District Court of Dallas County, Texas in Case No. 89-8439-F on November 23, 1992. (App. 12-1 to 12-3).

4. Final Judgment entered by the 116th Judicial District of Dallas County, Texas in Cause No. 89-8439-F on April 9, 1993. (App. 13-1 to 13-3).

5. Opinion of the Court of Appeals for the Seventh District of Texas at Amarillo in Case No. 07-93-0226-CV on July 26, 1994, reported at 886 S.W.2d 283. (App. 1-1 to 1-19).

6. Judgment rendered by the Court of Appeals for the Seventh District of Texas at Amarillo in Case No. 07-93-0226-CV on July 26, 1994. (App. 2-1).

7. Opinion of the Court of Appeals for the Seventh District of Texas at Amarillo in Case No. 07-93-0226-CV on November 1, 1994, on Motion for Rehearing, reported at 886 S.W.2d 283 (beginning on page 292). (App. 3-1 to 3-5).

8. Judgment rendered by the Court of Appeals for the Seventh District of Texas at Amarillo in Case No. 07-93-0226-CV on November 1, 1994. (App. 4-1).

9. Order of the Court of Appeals for the Seventh District of Texas at Amarillo, issued on November 28, 1994, overruling Second Motion for Rehearing (not reported). (App. 5-1 to 5-2).

10. Order Denying Application for Writ of Error issued by the Supreme Court of Texas in Case No. 95-0034 on May 11, 1995, 38 Tex. S.Ct. J. 565 (not reported). (App. 6-1).

11. Order Overruling Motion for Rehearing of the Application for Writ of Error issued by the Supreme Court of Texas in Case No. 95-0034 on August 1, 1995; 38 Tex. S.Ct. J. 1100 (not reported) (App. 8-1).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner seeks review of the actions of the Court of Appeals for the Seventh District of Texas and the Supreme Court of Texas. Opinion and Judgment of the Court of Appeals for the Seventh District of Texas were issued on July 26, 1994. On November 1, 1994, the Court of Appeals for the Seventh District of Texas issued an opinion on Motion for Rehearing and a Judgment (withdrawing its prior Judgment of July 26, 1994). On November 28, 1994, the Court of Appeals for the Seventh District of Texas overruled the Second Motion for Rehearing. On May 11, 1995, the Supreme Court of Texas denied Application for Writ of Error. On August 1, 1995, the Supreme Court of Texas overruled the Motion for Rehearing of the Application for Writ of Error. This Petition is filed within

ninety (90) days of the denial by the Supreme Court of Texas of the Motion for Rehearing of the Application for Writ of Error. (See Supreme Court Rule 13.1 and 13.3) The validity of a statute of the State of Texas is drawn in question in this case on the ground of its being repugnant to the United States Constitution, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Although the Court of Appeals for the Seventh District of Texas remanded a portion of the case to the trial court for further proceedings, the constitutional issue has been finally determined by the highest state court (the Supreme Court of Texas), and this Court has jurisdiction. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469; 95 S.Ct. 1029 (1975); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46; 109 S.Ct. 916 (1989). Neither the State of Texas nor any agency, officer, or employee of the State of Texas is a party to this proceeding, and 28 U.S.C. § 2403(b) may apply. This Petition is being served upon the Attorney General of the State of Texas. (See Supreme Court Rule 29.4(c).)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of constitutional and statutory provisions involved in this case are as follows:

1. First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peace-

ably to assemble, and to petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Article 1396-2.23, Texas Revised Civil Statutes:

> A. Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors, and committees having any authority of the board of directors and shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote.
>
> B. All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time.[1]

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[1] Paragraph B of the statute was amended, effective January 1, 1994, and now reads: "A member of the corporation, on written demand stating the purpose of the demand, has the right to examine and copy, in person or by agent, accountant, or attorney, at any reasonable time, for any proper purpose, the books and records of the corporation relevant to that purpose, at the expense of the member."

STATEMENT OF THE CASE

Petitioner, Citizens Association for Sound Energy ("CASE") was formed in January 1974 by a group of citizens who shared concerns about the projected construction of a nuclear power plant near Glen Rose, Texas (approximately 50 miles southwest of the Dallas/Fort Worth metropolitan area) known as Comanche Peak Steam Electric Station ("Comanche Peak"). In June, 1974, CASE was formally chartered as a non-profit corporation under the Texas Non-Profit Corporation Act (Art. 1396-1.01 et seq., Tex. Rev. Civ. Stats.). Enumerated corporate purposes were: (1) to inform, unify, and stimulate concerned, responsible individuals to effective action in the field of energy; (2) to offer information about how to use energy economically, what energy resources are available currently, what underdeveloped energy resources and innovative technologies can be made available, and how they affect the quality of life; and (3) to promote the economical use of energy resources in a way most compatible with a healthful environment, the attainment of human energy needs, and the preservation of the self-perpetuating ability of as many life species as possible.

The planned construction of Comanche Peak was the stimulus for the creation of CASE in 1974, and Comanche Peak has historically been the primary focus of the organization's efforts and activities.

The original board of directors was concerned about the potential devastating environmental impact of a major nuclear accident, especially so close to two large metropolitan areas. For over two decades, CASE has been indefatigable in its efforts to ensure that Comanche Peak

was designed, constructed and operated in a safe and efficient manner.

CASE has fulfilled its mission in part by assuring that both the public and the appropriate regulatory authorities were furnished with thorough and accurate information. For example, CASE acted as an intervenor in the initial and several later Dallas Power & Light rate hearings and also in the operating license proceedings before the Atomic Safety and Licensing Board of the U.S. Nuclear Regulatory Commission ("NRC"). CASE was extremely active and diligent in these proceedings, raising numerous substantive issues. CASE was unceasing in its efforts to identify particular problems, investigate them, and present evidence to the NRC.

In a sense, CASE became the public "watchdog" at Comanche Peak. Because of its tireless efforts, CASE gained a wide-spread reputation as an effective clearinghouse for relevant information – a safe outlet for persons having knowledge or evidence bearing upon safety measures.

CASE's effectiveness was so extraordinary that in 1988 it was granted an internal auditing and monitoring role at Comanche Peak in exchange for its intervention role, through a unique settlement agreement with Texas Utilities and a Joint Stipulation among CASE, Texas Utilities, and the NRC. This monitoring process was extensive and unprecedented: never before had an environmental organization been given such sweeping rights and direct access to a nuclear power plant for the purpose of auditing, raising, and exploring safety issues

(in addition to funds sufficient to allow CASE to pursue its efforts fully).

A full exposition of CASE's activities concerning Comanche Peak since 1974 is not possible. By way of illustration only, such involvement has included: raising of issues, meetings and discussions with Texas Utilities and input into upgrading Comanche Peak root cause analysis program, preparation of a report concerning Comanche Peak's Non-radiological Environmental Protection Plan Hazardous Chemical and Waste Program, investigation of several allegations dealing with non-radiological environmental violations, investigation and evaluation of the adequacy of design of pipe supports at Comanche Peak, preparation of a report on the Reactor Coolant System Cold Hydrostatic Test, and preparation of a voluminous report concerning Scaling Calculation Engineering Design Definition and Documentation Review. Many of these undertakings were in direct response to allegations brought to CASE by then-current and former workers at Comanche Peak. Similarly, CASE's investigative efforts in large part have been facilitated by cooperation from confidential sources.

Absolutely essential to CASE's success has been its ability to foster support from members, contributors, consultants, and informants, many of whom require complete confidentiality, e.g., current or former workers at Comanche Peak and other scientific professionals in the nuclear industry. Contributing factors in CASE's achievements have been monetary contributions, volunteer labor, and "whistleblower" information. This delicate equilibrium has been retained through CASE's ability to protect the confidentiality of its sources and supporters.

Respondents David and Barbara Boltz are former members, officers, and directors of CASE. By July 1988, their personal interests and purposes had become discordant to the objectives of the other members of the Board. The Boltzes' personal desires concerning the future direction of CASE made them a minority faction. Among other things, the Boltzes had proposed certain actions which the other Directors felt could seriously compromise CASE's ability to safeguard the confidentiality of its sources and supporters and divert needed funds from CASE's primary commitment to assuring the safety of Comanche Peak.

Having become disassociated because of their dissident views, the Boltzes persisted, through ulterior means, to pursue their own agenda. Some of these actions threatened to erode the very foundation of CASE's success – the credibility and trust which had been built through many years of diligent efforts. Probably the most egregious example of this conduct was their misuse and unauthorized disclosure of confidential information which had been provided to them by CASE in response to particular inquiries.

In this environment of mistrust and hostility, in April 1989, the Boltzes made a formal demand for the inspection and copying of "all books and records of CASE", citing the authority of Art. 1396-2.23 and Art. 1396-2.23A, Tex. Rev. Civ. Stats.[2]

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[2] Art. 1396-2.23A is a companion statute requiring each non-profit corporation to retain and make available for public inspection certain financial records. Some of the original Plaintiffs in this case, who had never been members of CASE, sought

On June 9, 1989, CASE made available to the Boltzes a large volume of documents for examination, including financial records, payroll records, ledgers, corporate records, and meeting minutes. CASE also provided the Boltzes with copies of additional detailed financial information and offered to provide copies of all monthly summaries of financial information prepared through June 1989 and to make the underlying books and records available to verify the accuracy of the summaries. However, CASE resisted demands for copies of other documents.

On July 17, 1989, this suit was commenced by the Boltzes (and others) seeking a declaration of the rights to inspect and copy CASE's books and records pursuant to the cited statutes.

In its responsive pleading, CASE questioned the constitutionality of the statutes:

> Compelling the disclosure of certain information sought by Plaintiffs would be an unjustified violation of the rights of privacy, association, and freedom of expression of Defendant's members, contributors, consultants and confidential sources, as guaranteed by the United States Constitution and the Texas Constitution.
>
> Under the particular circumstances of this case, Art. 1396-2.23 and Art. 1396-2.23A, Texas Revised Civil Statutes, as written and invoked

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production under that statute as well. The Texas Court of Appeals remanded that particular portion of the trial court's Judgment for further proceedings and did not reach the constitutional issue as it relates to Art. 1396-2.23A. 886 S.W.2d at 287; App. at page 1-5. Accordingly, the constitutionality of that particular statute is not yet ripe for consideration by this Court.

> by Plaintiffs, are unconstitutionally vague in that they would offer no protection of the privacy, associational and expression rights of the individual members, contributors, and information sources; and that the statutes offer no definition of proper purposes for seeking inspection of books and records; and that the statutes provide no remedies for misuse of any such information; and in that the statutes provide no safeguards against the misuse of any such information.

(Paragraphs VIII and X of the Defendant's Original Answer filed in the 116th Judicial District of Dallas County, Texas).

CASE also sought summary judgment on the issue, asserting that as a matter of law the statutes as invoked are unconstitutional and cannot be enforced against CASE. (Paragraphs XI and XII of the Defendant's Motion for Partial Summary Judgment filed in the 116th Judicial District Court of Dallas County, Texas).

CASE also resisted the Plaintiffs' Motion for Summary Judgment partly on the basis of that issue, asserting that material issues precluding summary judgment in favor of the Plaintiffs included:

> Whether the compelled disclosure of certain information sought by Plaintiffs would be an unjustified violation of the rights of privacy, association, and freedom of expression of certain of CASE's members, contributors, consultants, or confidential sources; and
>
> Whether Art. 1396-2.23 and Art. 1396-2.23A, Texas Revised Civil Statutes are unconstitutional.

(Paragraph 6(e) and (f) of Defendants' Response to Plaintiffs' Motion for Summary Judgment filed in the 116th Judicial District Court of Dallas County, Texas).

The trial court upheld the constitutionality of the statute by granting Plaintiffs' Motion for Summary Judgment, by denying Defendants' Motion for Partial Summary Judgment, and by entering Final Judgment. (App. at pages 10-1, 12-1 to 12-3, and 13-1 to 13-3).

On appeal, CASE again raised the issue of constitutionality. By specific points of error, CASE asserted:

> The trial court erred in denying Defendant's Motion for Summary Judgment because the subject statutes are unconstitutional.
>
> The trial court erred in granting Plaintiffs' Motion for Summary Judgment because the subject statutes are unconstitutional.

(Point of Error No. 1 and 2 of the Brief of Appellant filed in the Court of Appeals for the Seventh Judicial District of Texas).

The Court of Appeals held that the statute is constitutional "as applied by the trial court," primarily on the strength of a protective order issued by the trial court. 886 S.W.2d at 287 (App. at pages 1-5 to 1-6).

In its Motion for Rehearing, CASE asserted error in that ruling:

> The Court of Appeals erred in holding that Art. 1396-2.23, Texas Revised Civil Statutes "as applied" is constitutional; and in failing to hold that Art. 1396-2.23, Texas Revised Civil Statutes is unconstitutional.

(Point of Error No. 1 of Appellants' Motion for Rehearing filed in the Court of Appeals for the Seventh District of Texas).

The Court of Appeals again upheld the constitutionality of the statute as applied, stating that "the trial court's protective order prevents CASE's members from suffering any injury from the application of Art. 1396-2.23." 886 S.W.2d at 292-293 (App. at pages 3-2 to 3-3).

CASE filed a Second Motion for Rehearing with the Court of Appeals, asserting the same Point of Error. (Point of Error No. 1 of Appellants' Second Motion for Rehearing filed in the Court of Appeals for the Seventh District of Texas). The Court of Appeals overruled the assertion without further written opinion. (App. at pages 5-1 to 5-2).

CASE then sought review by the Supreme Court of Texas. Assigned as error was:

> The Court of Appeals erred in holding that Art. 1396-2.23, Texas Revised Civil Statutes "as applied" is constitutional; and in failing to hold that Art. 1396-2.23, Texas Revised Civil Statutes is unconstitutional.

(Point of Error No. 1 of Petitioner's Application for Writ of Error in the Supreme Court of Texas).

The Supreme Court of Texas denied the Application for Writ of Error without written opinion. (App. at pages 6-1 and 7-1).

CASE then sought rehearing in the Supreme Court of Texas, assigning the same error. (Rehearing Point No. 2(a)

of Petitioner's Motion for Rehearing in the Supreme Court of Texas). The Supreme Court of Texas denied the Motion for Rehearing without written opinion. (App. at pages 8-1 and 9-1).

ARGUMENT AND AUTHORITY

Art. 1396-2.23, Texas Revised Civil Statutes has two separate components: a recordkeeping requirement and a disclosure requirement. Subsection (A) of the statute mandates that all non-profit corporations must maintain complete books and records of account, minutes of the proceedings of its members, minutes of the proceedings of its board of directors, minutes of the proceedings of its committees having any authority of the board of directors, and a roster of the names and addresses of members. Subsection (B) of the statute provides that a non-profit corporation must make all of its books and records available for examination by any member or his agent or attorney.[3]

As interpreted by the Texas Court of Appeals, the right of inspection under subsection (B) literally extends to *all* books and records of the corporation and is not limited to those specific types of records enumerated in subsection (A). 886 S.W.2d at 290 and 292. (App. at pages 1-13 and 1-17). Moreover, the Texas Court of Appeals

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[3] Art. 1396-2.23 is part of the Texas Non-Profit Corporation Act, and the word "corporation" refers only to non-profit corporations. (See Art. 1396-1.02(A)(1), Tex. Rev. Civ. Stats.) A separate statute, with similar requirements, applies to corporations for profit. Art. 2.44, Tex. Bus. Corp. Act.

held that the statute requires a non-profit corporation not only to make all books and records available for inspection, but also to allow the records to be copied. 886 S.W.2d at 291. (App. at pages 1-16 to 1-17).

The statute contains no restriction on the use, disclosure, or dissemination of any information reflected by the corporate records.

On its face, the statute requires CASE (and all other non-profit corporations) to maintain records which would reflect in detail virtually every facet of its activities and operations. For example, "correct and complete books and records of account" would reflect the source and amount for all contributions and other revenue as well as the recipient and amount of all disbursements. Disclosure of this information would reveal the identities of all members, contributors, and supporters (and the level of their involvement). It would also reveal the identities of consultants or experts who might be compensated by the organization. Information reflected in such records would also be an indicator, at any given time, of an organization's financial ability or inability to implement actions to further its stated objectives.

Minutes of all proceedings of the members, the board of directors, or committees would reflect the views and opinions expressed by particular individuals, various ideas advocated, particular plans considered and adopted or rejected, and general goals and strategies formulated. In some instances, the identities and roles of particular members, supporters, contributors, consultants, informants, and whistleblowers would also be contained in such minutes.

The right of examination and copying extends not only to all financial records, all minutes, and the roster of members, but also to any other books and records which might be maintained by the corporation. Thus, such items as documents received from whistleblowers and other confidential informants, transcripts and notes of confidential conversations, preliminary drafts of reports, documents reflecting communications with third parties (e.g., news media, Congress, NRC, etc.), and lists of financial contributors and confidential sources are all open to examination.

In short, the statute allows no room for secrecy or confidentiality of information. There is no protection for the privacy and associational rights of supporters and informants. Further, the statute undermines a group's collective ability to engage in private debate and to formulate objectives and strategies. In turn, this has a direct negative impact upon the capability of CASE and similar organizations to be effective advocates for their causes.

As interpreted by the Texas Court of Appeals, the statute affords every member of a non-profit corporation, without limitation, the right to examine and copy all corporate documents. A "member" of a non-profit corporation is defined as one having membership rights in accordance with the provisions of the Articles of Incorporation or Bylaws. Art. 1396-1.02(A)(6), Tex. Rev. Civ. Stats. For many organizations like CASE, requirement for membership may be nothing more than payment of nominal dues, subscription to a periodical publication, simple registration, or other such innocuous acts. There may be entire classes of members of non-profit corporations with

no voting or management rights, and who have no participation whatsoever in the operation or direction of the organization. See Art. 1396-2.08, Tex. Rev. Civ. Stats. Yet, under Art. 1396-2.23, as interpreted by the Texas Court of Appeals, such non-participating members would have the right to inspect and copy records revealing every minute detail of the organization's activities, with no statutory limitation on the use or disclosure of such information. The statute is tantamount to a requirement of public disclosure. It stifles rather than fosters social and political advocacy. The protective curtain of secrecy and privacy is thrown open, and the entire works of the organization are laid bare for public scrutiny.

Over the past four decades, this Court has repeatedly confirmed the right of citizens, both individually and collectively, to be free from unwarranted interference in their associations. This right is protected under the First Amendment to the U.S. Constitution and is applicable to the states by the Fourteenth Amendment. This principle was clearly enunciated first in *NAACP v. Alabama*, 357 U.S. 449; 78 S.Ct. 1163 (1958). In that case, it was held that the State of Alabama could not compel the NAACP to reveal the names and addresses of its members and agents in Alabama. Recognizing that the organization "is but the medium through which its individual members seek to make more effective the expression of their own views," it was determined that the NAACP was the appropriate party to assert the constitutional rights of its members. 357 U.S. at 459; 78 S.Ct. at 1170. This Court then held that compelled disclosure of the names and addresses of members would impermissibly infringe upon their rights. The "freedom to engage in association

for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. . . . ". 357 U.S. at 460; 78 S.Ct. at 1171. State action which might have a deleterious effect upon the freedom to associate is subject to "closest scrutiny", even where such action "may appear to be totally unrelated to protected liberties." 357 U.S. at 461; 78 S.Ct. at 1171.

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. at 462; 78 S.Ct. at 1171-1172.

This intrusion into the privacy of association can be justified only by a "compelling" state interest. 357 U.S. at 463; 78 S.Ct. at 1172.

The issue was next visited in *Bates v. City of Little Rock*, 361 U.S. 516; 80 S.Ct. 412 (1960), involving interpretation of a city ordinance in many respects similar to Art. 1396-2.23. The City of Little Rock had passed an amendment to its occupation license tax ordinance requiring the disclosure of certain information which was to be public and subject to inspection at all reasonable business hours. Among the information to be revealed was a financial statement with an itemized list of the

amounts and sources of dues, fees, assessments and contributions, as well as disbursements. The local chapters of the NAACP refused to supply the records, contending that it would entail the disclosure of the names of members and contributors. Relying upon *NAACP v. Alabama*, this Court held that the ordinance was unconstitutional in that it represented a significant interference with the freedom of association of the organization's members. 361 U.S. at 523; 80 S.Ct. at 417. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." 361 U.S. at 523; 80 S.Ct. at 416.

In *Shelton v. Tucker*, 364 U.S. 479; 81 S.Ct. 247 (1960), this Court considered a statute compelling public school teachers to file annual reports listing every organization to which the teacher had belonged or contributed within the preceding five years. Despite the existence of a legitimate and substantial state purpose (i.e., the right to investigate the competency and fitness of public teachers), the statute was unconstitutional because its "comprehensive interference with associational freedom" exceeded what might be justified by that purpose. 364 U.S. at 490; 81 S.Ct. at 253. Even a legitimate purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. at 488; 81 S.Ct. at 252. Of particular concern was the fact that the statute did not require the information to be kept confidential, as public exposure would further aggravate the infringement. 364 U.S. at 486-487; 81 S.Ct. at 251.

These principles were reaffirmed in *Louisiana v. NAACP*, 366 U.S. 293; 81 S.Ct. 1333 (1961), where this

Court upheld the issuance of a temporary injunction restraining the enforcement of a statute requiring the principal officer of certain organizations to file with the Louisiana Secretary of State a list of the names and addresses of all members and officers. The following points were basic to the holding: (1) freedom of association is a protected constitutional right under the First and Fourteenth Amendments; (2) the organization had standing to assert the constitutional rights of its members; (3) disclosure of membership identities is not required where it would result in an unjustified infringement of constitutional rights; and (4) regulation must be "highly selective" to survive scrutiny. 366 U.S. at 296; 81 S.Ct. at 1335. Regulatory measures, "no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." 366 U.S. at 297; 81 S.Ct. at 1336.

In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539; 83 S.Ct. 889 (1963), this Court again held as unconstitutional efforts to compel disclosure of the identity of members and contributors of local NAACP organizations, this time by way of a subpoena issued by a legislative committee investigating Communist and subversive activities. The committee's action was unjustified because there was no showing of a substantial connection between the local organizations and any Communist or subversive activities. The right to maintain the "privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon" without an essential connection to a compelling state interest. 372 U.S. at 555; 83 S.Ct. at 898.

> While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.

372 U.S. at 556-557; 83 S.Ct. at 898-899.

Similarly, in *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825; 86 S.Ct. 1148 (1966), it was held that an individual being questioned in a legislative investigation of subversive activities had a right under the First Amendment to refuse to disclose information concerning prior political associations, meetings attended, and the views expressed and ideas advocated at any such meetings. In the absence of a showing of present danger of sedition, there was no overriding State interest sufficient to justify the intrusion. 383 U.S. at 829-830; 86 S.Ct. at 1151-1152. It was noted that public exposure would be "objectionable and damaging in the extreme to one whose associations and political views do not command majority approval." 383 U.S. at 829; 86 S.Ct. at 1151.

In *California Bankers Association v. Shultz*, 416 U.S. 21; 94 S.Ct. 1494 (1974), this Court had before it a constitutional challenge to certain recordkeeping requirements of the Bank Secrecy Act on the basis that an examination of an organization's bank records could be used to obtain the identities of its members and contributors. The Court again recognized that the individuals had the right to

keep their membership protected from compelled disclosure absent a countervailing governmental interest and also acknowledged the standing of the organization – in that case, the American Civil Liberties Union – to assert the members' rights. 416 U.S. at 55; 94 S.Ct. at 1514. However, it was held that the constitutional challenge was premature because no actual disclosure was being sought and the mere existence of the records only posed a remote threat to constitutional liberties. 416 U.S. at 56; 94 S.Ct. at 1515.

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208; 107 S.Ct. 544 (1986), it was stated that "an organization has a constitutional right to protect the privacy of its membership rolls" in situations where the affiliated individuals may be subjected to public hostility or discrimination. 479 U.S. at 215; 107 S.Ct. at 549 (Footnote 5).

The protection against compelled disclosure covers not only membership lists, but also extends to information concerning financial transactions.

> The right to join together "for the advancement of beliefs and ideas," (citation omitted) is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is to be truly or optimally "effective". Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs." (Citation omitted.) Our past decisions have not drawn fine lines between

> contributors and members but have treated them interchangeably.

Buckley v. Valeo, 424 U.S. 1, at 65-66; 96 S.Ct. 612, at 657 (1976). And see *Pollard v. Roberts*, 283 F.Supp. 248 (E.D. Ark. 1968; aff'd. per curiam 393 U.S. 14; 89 S.Ct. 47 (1968)), enjoining disclosure of bank records reflecting identities of political party contributors and amounts of their contributions, on the basis that such information was constitutionally protected.

Under *NAACP v. Alabama* and its progeny, it is beyond debate that the members, supporters, contributors, informants, and others affiliated with CASE have a constitutional right of privacy in their association. This right cannot be infringed by compelled disclosure in the absence of a substantial governmental interest that has a relevant correlation to the information required to be disclosed. The governmental interest must be given exacting scrutiny, even if any deterrent effect on the freedom of association and expression arises indirectly and unintentionally from the government's conduct in requiring disclosure. It is also clear that these constitutional rights can be asserted by CASE itself.

Without question, Art. 1396-2.23, Tex. Rev. Civ. Stats. infringes upon these guaranteed freedoms. The threat to constitutional liberty is two-fold. First, and most obviously, the statute compels the disclosure of information reflecting the identities of members, supporters, consultants, informants, whistleblowers, and other allies. This violates the most basic right: privacy of association – the right to remain anonymous in one's affiliations.

Second, the very ability of the organization to function effectively is placed at risk. If organizations like CASE cannot assure confidentiality and privacy in its dealings, the capability to obtain relevant and otherwise unavailable information, and put it to use, will be lost. The right of association and expression is meaningless unless it can be exercised with effect.

In holding that the statute is constitutional, the Texas Court of Appeals relied primarily on the existence of a protective order entered by the trial court imposing certain precautions and limitations not found in the statute itself. The Court stated: "Given the existence of the protective order, we hold that the statute, as applied by the trial court, is constitutional and is not subject to the vises [sic] argued by CASE." 886 S.W.2d at 287. (App. at page 1-6). The trial court's action in limiting the application of the statute in a particular situation does not render the statute constitutional. The burden should not fall upon trial courts to cure constitutional deficiencies on a case-by-case basis. Nor is a constitutional challenge precluded by the fact that there may be particular applications which do not invade protected liberties.

Even when related to an overriding and legitimate state purpose, statutory disclosure requirements will survive the "exacting scrutiny" only if drawn with sufficient narrow specificity to avoid infringement upon protected freedoms more broadly than is absolutely necessary. *Buckley v. Valeo,* 424 U.S. at 68; 96 S.Ct. at 658. "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose." *Shelton v. Tucker,* 364 U.S. at 488; 81 S.Ct. at 252.

With respect to Art. 1396-2.23, there is no overriding governmental interest at all, let alone one which would justify the compelled disclosure. Further, the statute is not narrowly or specifically drawn; rather, it requires the broadest possible disclosure. There are no restrictions or limitations upon dissemination of the information. There are absolutely no safeguards for First Amendment rights. Reliance upon a protective order drafted by the trial court begs the constitutional question. If legislation is narrowly drawn with due regard for protected liberties, there will be no need for a protective order.

In rejecting the constitutional challenge, the Texas Court of Appeals also relied upon the doctrine of standing, stating that a party must "show that the challenged statute is unconstitutional as to him and his particular situation," and that "it is not sufficient to show that the statute might be unconstitutional in another situation." 886 S.W.2d at 292. (App. at page 3-2).

This holding totally ignores the particular circumstances of the instant litigation and misconstrues the rule of standing as applied in First Amendment cases. The Court of Appeals did not find that the *statute*, as applied to CASE, was constitutional, but found instead that constitutional concerns were addressed by the protective order. More importantly, a constitutional challenge of this type need not arise in a particular circumstance of unlawful infringement. *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, at 574; 107 S.Ct. 2568, at 2572 (1987). In First Amendment situations, a party whose own conduct may be unprotected is nonetheless permitted "to challenge the proscription as it applies to others because of the possibility that protected

speech or associative activities may be inhibited by the overly broad reach of the statute." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 618, at 634; 100 S.Ct. 826, at 835 (1980).

CASE concedes that there are situations where Art. 1396-2.23 may be applied without abridging First Amendment rights, even without a protective order. For example, many condominium homeowners associations are organized as non-profit corporations. See § 82.101, Tex. Prop. Code. With such groups, it is unlikely that the disclosures required by the statute would impinge upon personal freedoms. It is equally obvious that "as applied" to organizations like CASE, the statute is impermissibly intrusive upon constitutional rights. Associations like CASE, the Sierra Club, the NAACP, the ACLU, and other groups that serve as vehicles for social or political advocacy and the exercise of other First Amendment rights, are commonly organized as non-profit corporations. Art. 1396-2.23 was not drafted with a view toward protecting the freedoms and liberties of such organizations and their members and supporters.

The danger posed to CASE and similar organizations is real, not imagined. In *United States v. Garde*, 673 F.Supp. 604 (D.C. 1987), the District Court for the District of Columbia encountered a situation where the NRC sought by subpoena to compel an attorney for a non-profit organization (Government Accountability Project) to disclose any and all information (including client identities) which had been obtained by the group concerning safety of a nuclear power project near Houston, Texas. A number of current or former employees at the plant had gone to GAP with information about safety concerns. The

Court declined to enforce the subpoena on the basis of the same constitutional issues which are at stake in the instant litigation. The Court recognized that GAP and its attorney served as "a vehicle for political expression and association," and noted that it could be inferred from the fact that the whistleblowers had gone to the organization in the first place that they "do not wish their identities disclosed to the government without pledges of confidentiality acceptable to them." (673 F.Supp. at 607) Cognizance was also taken that in addition to the infringement of the constitutional rights of the individuals, injury to the organization itself was also threatened.

> From this point, it is but a short step to the conclusion that if the government is successful in compelling Ms. Garde to reveal the information given to her, especially the identity of those she represents, GAP will lose the confidence of some of its whistleblower informants and its efforts to gather and present safety allegations will suffer. This is the harm that GAP claims, and it is cognizable under the right to association.

637 F.Supp. at 607. The same dangers are posed to CASE and similar organizations by disclosure statutes like Art. 1396-2.23 and Art. 1396-2.23A, Tex. Rev. Civ. Stats.

It is easily seen that these statutes can be used as devices to seek disclosure of information infringing upon the freedoms and liberties guaranteed by the First Amendment. See, e.g., *Texas Appellate Practice and Educational Resource Center v. Patterson*, 902 S.W.2d 686 (Tex. App. – Austin, 1995; application for writ of error filed 9/19/95), involving efforts to obtain information about

the activities of an organization involved in the representation of death row inmates and public advocacy against the death penalty.

CONCLUSION

Because of the obvious threat to First Amendment freedoms of association, expression and privacy, Art. 1396-2.23, Tex. Rev. Civ. Stats. is unconstitutional. The infringement upon fundamental liberties does not withstand the "exacting scrutiny" required. There is no compelling or overriding state interest, and the statute is not narrowly drawn to avoid unwarranted intrusion. For these reasons, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Supreme Court should reverse the Opinions and Judgments of the courts below, and should render Judgment that Art. 1396-2.23, Tex. Rev. Civ. Stats. is unconstitutional.

Respectfully submitted,

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APPENDIX 1

NO. 07-93-0226-CV

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL D

JULY 26, 1994

CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE), APPELLANT

V.

DAVID AND BARBARA BOLTZ AND JOE COOK, APPELLEES

FROM THE 116TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY;

NO. 89-8439-F;
HONORABLE FRANK ANDREWS, JUDGE

Before REYNOLDS, C.J., and BOYD and POFF, JJ.

Appellant Citizens Association for Sound Energy (CASE) brings this appeal from a summary declaratory judgment in favor of appellees David Boltz, Barbara Boltz, and Joe Cook. In its judgment, the trial court overruled CASE's motion for partial summary judgment and, in granting appellees' motion, decreed that appellees were entitled to inspect and copy some of CASE's records by virtue of Articles 1396-2.23 and 1396-2.23A of the Non-

Profit Corporation Act[1] (the Act). Parenthetically, although Earl and Alma Burnham, Charles and Betty Brink, Charles and Betty Crabtree, and Kay C. Taebel were originally listed as parties plaintiff in the suit, upon their motion they were dismissed and are no longer parties to the suit or to this appeal. For the following reasons, we affirm in part and reverse in part.

Section A of Article 1396-2.23 of the Act provides, in general terms, that a non-profit corporation must keep correct and complete books and records of account, of the minutes of the proceedings of its members, board of directors and committees, and of the names and addresses of its members that are entitled to vote. Section B of the statute provides that "[a]ll books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time."[2]

Article 1396-2.23A addresses, in more detail, the manner in which the financial records of a non-profit corporation are to be maintained. It provides for the preparation of an annual financial report and requires that all records, books, and reports be kept for at least

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[1] Tex. Rev. Civ. Stat. Ann. art. 1396-1.01. to -11.01. (Vernon 1980 & Supp. 1994).

[2] Section B was amended in 1993, effective January 1, 1994, to read:

> A member of a corporation, on written demand stating the purpose of the demand, has the right to examine and copy, in person or by agent, accountant, or attorney, at any reasonable time, for any proper purpose, the books and records of the corporation relevant to that purpose, at the expense of the member.

three (3) years after the closing of each fiscal year. The article also provides for a criminal penalty for failing to comply with the statute and enumerates certain types of corporations that are exempt from the statute. Section C of the article provides that the records be kept at the registered office or the principal office of the corporation and "shall be available to the public for inspection and copying there during normal business hours."

In eleven points, CASE challenges the trial court's summary declaratory action. These points can be grouped into seven arguments: (1) the relevant provisions of the Act are unconstitutional; (2) appellees are not members of the class entitled to inspection of corporate records under Article 1396-2.23 of the Act; (3) CASE is exempt from the provisions of Article 1396-2.23A of the Act; (4) there were material fact issues as to whether appellees had already been given the opportunity to inspect the records they were entitled to inspect and whether they were entitled to inspect any additional records; (5) appellees did not show they were entitled to the relief they sought as a matter of law; (6) Article 1396-2.23 of the Act does not authorize the copying of corporate records; and (7) the judgment is not sufficiently definite to define and protect the rights of the parties.

CASE's primary focus, since its inception, has been to monitor and protect the safety and costs of the Comanche Peak nuclear power plant. CASE has participated in public hearings, filed public comments with regulatory agencies, and engaged in other activities related to the licensing and construction of the Comanche Peak power plant. In 1988, as a result of those activities, the president of CASE executed a settlement agreement with Texas

Utilities, the operator of the plant, whereby Texas Utilities was to, inter alia, pay CASE, its president, and others (generally referred to as the Whistleblowers) a total of ten million dollars.

From 1980 through the time of the settlement, appellees David and Barbara Boltz were officers and members of the board of directors of CASE. Assertedly because they were concerned with CASE's handling of the settlement with Texas Utilities, *viz.*, CASE's efforts to prevent public disclosure of the settlement terms and its commitment to participate in future regulatory actions, the Boltzes resigned as officers and members of the board on July 19, 1988. Their resignations were accepted on July 29, 1988.

By letter dated January 5, 1989, the Boltzes requested information concerning the distribution of money paid to CASE as a result of the 1988 settlement. By letter dated March 31, 1989, the Boltzes received a computer printout summary from CASE; however, the summary was not satisfactory to the Boltzes. On April 25, 1989, the Boltzes, through their attorney, made an additional written request to inspect and copy those records to which the right of inspection under Articles 1396-2.23 and 2.23A applied. Together with their attorney, the Boltzes were allowed to inspect several of CASE's records on June 9, 1989. They then requested copies of each of the documents they inspected. On June 14, 1989, the Boltzes were notified that they would not be supplied the copies they had requested but they could receive copies of monthly summaries. On July 7, 1989, CASE provided copies of two financial reports but continued to refuse to furnish the

other copies requested. As a result, this suit was filed on July 17, 1989.

As this appeal concerns a summary judgment, our review must be conducted in accordance with the litany of standards articulated in *Nixon v. Mr. Property Management Company*, 690 S.W.2d 546 (Tex. 1985). Those standards are:

> 1. The movant has the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law;
>
> 2. In deciding whether there is a disputed material fact issue, evidence favorable to the non-movant will be taken as true;
>
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Id. at 549.

In its first two points, CASE challenges the constitutionality of the inspection provisions of Articles 1396-2.23 and 1396-2.23A, devoting the larger portion of its brief to this question. CASE argues that an inspection under these provisions has an impermissible chilling effect on its ability to obtain or retain members and gather information from confidential informants, described as absolutely essential to its effectiveness. For reasons later expressed, we believe a material fact question exists as to the applicability of Article 1396-2.23A; therefore, we limit our discussion to the constitutionality and the applicability of Article 1396-2.23.

Throughout CASE's extended discussion of the unconstitutionality of this statute, it fails to acknowledge

the existence of the protective order issued by the trial court.[3] This order provides, inter alia, that appellees "shall not be entitled to examine or copy any records revealing the identities of CASE's members, contributors, consultants, or confidential sources of information." The order further provides that appellees and their attorneys may not disclose the contents of any of the records examined or copied. CASE has made no allegation, and there is nothing in the record, that indicates a lack of enforceability of the order. Given the existence of the protective order, we hold that the statute, as applied by the trial court, is constitutional and is not subject to the vises argued by CASE.[4] Accordingly, CASE's first and second points are overruled.

In its third point, CASE contends the evidence conclusively establishes that appellees are not members of CASE. In the alternative, CASE argues in its fourth point that there was a fact question concerning appellees' membership. If appellees were not members, they would have

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[3] In its initial partial summary judgment, the trial court overruled CASE's motion for partial summary judgment and granted appellees' motion for inspection without awarding attorney's fees. In the judgment, which was later adopted and incorporated in the final summary judgment giving rise to this appeal, CASE was directed to prepare a protective order. The protective order was approved and incorporated in the final judgment.

[4] Because this order not only prevents further disclosure of the information obtained but also prevents appellants from learning the identities of CASE's members, contributors, consultants, or informants, it does not present the issues raised in *Ex parte Lowe*, 37 Tex. Sup. Ct. J. 918, 921 (June 8, 1994); or *Tilton v. Moye*, 869 S.W.2d 955, 956 (Tex. 1994).

no right of inspection under Article 1396-2.23. CASE has failed to cite any authority or discuss the relevant facts in its attenuated presentation of the points in its brief. Failure to comply with the minimum briefing requirements of Rule 74(f) of the Texas Rules of Appellate Procedure raises a question as to whether these points have been waived. *New York Underwriters Ins. v. State Farm*, 856 S.W.2d 194, 204 (Tex.App. – Dallas 1993, no writ); *Board of Comm. of Beaver County v. Amarillo Hospital Dist.*, 835 S.W.2d 115, 122-23 (Tex.App. – Amarillo 1992, no writ). However, because of the nature of this appeal and the fact that we can determine the thrust of CASE's challenge under these points, we will consider them.

CASE's challenges must fail as to the Boltzes. When the Boltzes resigned as officers and directors of CASE and when they requested an inspection of the corporate records, CASE's bylaws contained similar provisions. The earlier bylaws provided:

> Members shall be accepted throughout the year by fulfillment of the current requirement (sic) of the corporation for paid or worker members and by being accepted by the Board of Directors.

Effective February 8, 1989, the bylaws were amended and defined members as:

> [T]hose persons who have paid and are current in their annual dues to the Corporation, which annual amount shall be set by resolution of the Board of Directors, and who have been accepted by the Board of Directors of the Corporation are referred to herein as the "Members." Annual dues may be paid at any time during the calendar year, and when accepted, shall entitle that

person to be a Member through the last day of the twelfth month following the date of such acceptance.

It is undisputed that the Boltzes were members of CASE through July 18, 1988. In their June 19, 1988 resignation letter, the Boltzes specifically asked the Board of Directors to "accept our joint resignation both from the Board and from our positions as C.A.S.E.'s Vice-President and Secretary, effective immediately." By its terms, the letter was limited to the positions named therein and did not amount to a membership resignation.

There is no summary judgment evidence that the Boltzes' membership was terminated by any bylaw provision. Attached to CASE's motion for partial summary judgment are checks of the Boltzes and others which were tendered to CASE for membership renewal. The Boltzes' check is dated June 12, 1989. As indicated above, the bylaws provide that membership fees are on an annual basis. That being so, the Boltzes' previous membership renewal must have been on or about June 1988. Absent any evidence that the Board of Directors had taken any action to terminate the Boltzes' membership, and inasmuch as the record does not show any bylaw provision authorizing the board to terminate an existing membership, the record is sufficient to show that the Boltzes were members when they made the request to inspect and copy CASE's records under Article 1396-2.23. That being so, CASE's refusal to renew the Boltzes' membership in August 1989 has no effect upon their membership status when the initial inspection request was made in April 1989. Appellant's third and fourth points must be overruled as to appellees David and Barbara Boltz.

There is, however, no evidence in this record as to whether or not appellee Joe Cook was a member of CASE. That being so, we must overrule CASE's third point but sustain its fourth point as far as Cook is concerned.

In its fifth and sixth points, CASE argues that the evidence conclusively establishes that it is exempt from the provisions of Article 1396-2.23A or, in the alternative, that a fact question exists as to whether it is entitled to such an exemption. Article 1396-2.23A, of course, relates to the maintenance and disclosure of financial records of non-profit corporations. As we have noted above, its relevant particulars require non-profit corporations to keep true and accurate financial records, to make an annual report of financial activity of the corporation, to keep such records for a period of three years after the closing of each fiscal year, and to make such records available "to the public" for inspection and copying.

In claiming that it is exempt from the provisions of the article, CASE relies upon the exemption contained in section (E), subsection (7) for "an organization whose charitable activities relate to public concern in the conservation and protection of wildlife, fisheries, and allied natural resources." Tex. Rev. Civ. Stat. Ann. art. 1396-2.23A(E)(7) (Vernon 1980).

In support of its exemption claim, CASE relies upon the affidavits of its president, Juanita Ellis, as well as the purposes clause of its articles of incorporation. The purpose clause of CASE's articles of incorporation refers to "the preservation of the self-perpetuating ability of as

many life species as possible." In her affidavit, Ellis discusses CASE's concern over the "far-reaching effect which a nuclear accident could have, including the impact on wildlife and natural resources." In a supplemental affidavit, Ellis refers to CASE's participation in a report evaluating the environmental protection plan of the Comanche Peak plant and notes that the corporation had been involved with the preparation of the report "[s]ince the filing of CASE's Response to Plaintiffs' Motion for Summary Judgment." Accepting this last statement as true, it is clear that these particular activities of CASE occurred long after the Boltzes' request for information under Article 1396-2.23A. Therefore, the supplementation is not probative as to whether the corporation was exempt from the statute when the Boltzes requested corporate information in 1989.

Although we do not agree that the summary judgment evidence is sufficient, as a matter of law, to show CASE's exemption under the statute, we agree that it is sufficient to raise a fact question concerning its eligibility for the exemption. Accordingly, although we overrule CASE's fifth point, we must sustain its sixth point.

Article 1396-2.23(B) requires that a member's right to inspect corporate records must be for a "proper purpose." In its seventh point, CASE contends that a material fact issue exists as to whether the Boltzes sought to examine the corporate record for a "proper purpose" within the purview of the statute.

There is a dearth of cases construing the meaning of the term "proper purpose" as used in this statute. However, there is an analogous provision contained in Article

2.44(C) of the Texas Business Corporation Act (TBCA) and its predecessors. As a member in a nonprofit corporation is sufficiently similar to a shareholder in a for-profit corporation, we find the cases construing the TBCA's "proper purpose" phrase useful and persuasive.

As evidence of a lack of "proper purpose," CASE initially points out the antagonism existing between Ellis and the Boltzes. We fail to see how any such hostility would render the Boltzes' motive for wanting an inspection improper, nor do we believe that the mere fact that Ellis and the Boltzes were on unfriendly terms was indicative of an improper purpose. In *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815 (Tex. Comm'n App. 1933), the commission also rejected a corporation's argument that the animosity between the corporation and the stockholders seeking the right of inspection was a ground for denying an examination of the corporate books. *Id.* at 818. The statute involved in *Moore* did not contain a "proper purpose" provision, *see* Tex. Rev. Civ. Stat. art. 1328 (1925) (repealed 1961); however, the commission's reasoning aids us in determining whether appellees sought to inspect the books for a "proper purpose" within the purview of the present statute.[5]

As additional authority for its position that "inspection of corporate records will not be allowed for speculative purposes," CASE cites 18A Am. Jur. 2d *Corporations*

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[5] In *Moore*, the question before the commission was whether the friction between the corporation's officers and the shareholders seeking an inspection demonstrated a "corrupt purpose" in seeking the inspection so as to prevent the granting of mandamus relief.

§ 382 (1985). An examination of that authority, however, reveals that it does not cite any Texas authority for that proposition.

In *Chavco Investment Co. v. Pybus*, 613 S.W.2d 806 (Tex.Civ.App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.), the court held that the right of a stockholder to inspect corporate books, although not absolute, is a valuable right which cannot be circumvented by a mere conclusion that an improper purpose exists. *Id.* at 809. That being so, the court held that mere conclusory statements such as the existence of bad faith, improper purpose, or a disagreeable purpose are not sufficient to raise a fact issue as to proper purpose; rather, specific facts must be alleged showing an improper motive. Although *Chavco* involved a for-profit corporation and the holding was in the context of an application for mandamus, the surrounding circumstances are sufficiently similar to those here to make the court's reasoning persuasive and applicable. Therefore, we hold that once the Boltzes established that they were members of CASE under the bylaws, they had demanded their right of inspection under Article 1396-2.23, that the request was for a proper purpose, and that the corporation refused to grant such request, that in order to avoid an adverse summary judgment, it was CASE's burden to allege specific facts showing a lack of proper purpose and support those allegations with summary judgment evidence. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979). This was not done. CASE's seventh point is overruled.

In its eighth point, without citation of relevant authority, CASE argues the trial court erred in its judgment because appellees had already been "given access to all of the records to which they were entitled." Parenthetically, CASE's use of the phrase "to which they were entitled" implies that there were additional records of the corporation to which the Boltzes were not given access because CASE felt they were not covered by the right of inspection. Although section (A) enumerates specific records which must be maintained by the corporation, the right of inspection under section (B) is not limited to those records. The text of section (B) in effect at the time of the Boltzes' request clearly provided that the right of inspection extended to "[a]ll books and records of a corporation. . . . "[6]

Additionally, even accepting CASE's position that it had previously permitted an inspection of some, or even all, of its records, we note that Article 1396-2.23(B) does not limit or specify the number of times a member may inspect corporate records other than that the inspection be "for any proper purpose at any reasonable time." In the absence of a showing that the right of inspection has been used by a member for harassment or to impede the management of the corporation, the right of inspection is not limited in number and certainly not to only one inspection. *See Smith v. Trumbull Farmers Gin Co.*, 89 S.W.2d 829, 830 (Tex.Civ.App. – Waco 1936, no writ).

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[6] Effective January 1, 1994, the current text of 1396-2.23(B) limits the right of inspection to "the books and records of the corporation relevant to [the] purpose [of the inspection]." Tex. Rev. Civ. Stat. Ann. art. 1396-2.23(B) (Vernon Supp. 1994).

There is no evidence in this record that the Boltzes' requests have been repeated in such numbers as to indicate a harassment scheme or to impede the management of the corporation. Indeed, under the evidence before us, it appears that only one such inspection has occurred. Similarly, the furnishing of a financial statement of the corporation in lieu of the original financial records, as was done here, is not sufficient to satisfy a right to inspect the corporate books. *Moore*, 59 S.W.2d at 818. CASE's eighth point is overruled.

Repeating the arguments presented in points four and six, CASE asserts, in its ninth point, that the Boltzes' affidavits submitted in support of their motion for summary judgment are incompetent for the reason that they are based on "subjective conclusions, opinion, impressions and speculation." As we have determined that a fact question exists concerning CASE's entitlement to an exemption from Article 1396-2.23A, we address this argument only as it applies to the trial court's determination that the requirements of Article 1396-2.23(B) were met.

In order to be entitled to a summary judgment declaring their entitlement to the benefits of this statute, the Boltzes were required to establish the absence of a material question of fact as to their request to inspect the corporate records, the proper purpose of the request, their membership in CASE at the time of the request, and the corporation's refusal to allow an inspection. The affidavits of the Boltzes set out in some detailed the basis for their concern about how CASE was handling the money from the settlement with Texas Utilities. As noted above, the better view in Texas is that once a stockholder, or a member, has established that his right of inspection for a

proper purpose has been denied, the corporation has the burden of proving that the purpose of the inspection is improper or, in a summary judgment context, that a fact question exists as to the existence of an improper purpose. *See* James L. Young, *Texas Law on Stockholder Inspection Rights: How Does It Stack Up Against Delaware and the Model Business Corporation Act*, 40 Sw. L.J. 845, 856 (1986). Considering the predisposition of the law in favor of allowing reasonable inspections of corporate books and records and the difficulty of showing a proper purpose, the subjective nature of parts of the Boltzes' affidavits does not make them incompetent to establish a proper purpose.

However, establishing the Boltzes' membership at the time of their request is necessarily more fact specific. In determining whether the summary judgment evidence was sufficient on this issue, the trial court could consider not only the Boltzes' affidavits avowing their continued membership through the time of their request, but also the evidence submitted by CASE in support of their motion for partial summary judgment. *Woods v. Applemack Enterprises, Inc.*, 729 S.W.2d 328, 331 (Tex.App. – Houston [14th Dist.] 1987, no writ). This evidence included the Boltzes' letter resigning as officers and directors but not as members, CASE's articles of incorporation defining the qualifications for membership, and Juanita Ellis's August 12, 1989 letter rejecting the Boltzes' attempt to renew their membership some four months after the request for inspection had been made.

In her affidavit in support of CASE's motion for partial summary judgment, Ellis states that "[n]one of the [appellees] is a current member of CASE," and avers that

the memberships of appellees expired prior to their attempt to renew their memberships in 1989. However, that affidavit does not bear on the question of whether the Boltzes were members on April 25, 1989, the date of their inspection request. Inasmuch as the Boltzes' status at the time of their request is the matter at issue, their status on the date of the motion for summary judgment is immaterial. CASE's ninth point is overruled.

In its tenth point, without citation of authority beyond the statute itself, CASE assigns error to that part of the trial court's order permitting the Boltzes to make copies of the records covered by Article 1396-2.23. CASE points out that, unlike Article 1396-2.23A(c) which specifically authorizes "inspection and copying" of the records made available under that article, section (B) of Article 1396-2.23 only provides for the inspection of the records within its purview. Based upon the different wording of the statutes, CASE argues the legislature did not intend to authorize the copying of records covered by Article 1396-2.23.

Subsequent to the trial court's judgment, the legislature amended the language of Article 1396-2.23(B) to specifically include the right to make copies, at the member's expense, of records inspected by virtue of that article. Act of June 16, 1993, 73rd Leg., R.S., ch. 733, § 12, 1993 Tex. Gen. Laws 2873. As noted in the comment of the bar committee, the change in the language was "to clarify that the books and records that may be inspected must be relevant to that purpose, and that copies may be made at the member's expense." Tex. Rev. Civ. Stat. Ann. art. 1396-2.23(B) Comment of Bar Committee-1993 (Vernon Supp. 1994).

Even though the new provision did not become effective until January 1, 1994, the statement of the bar committee that the amendment was in clarification rather than in substance compels us to conclude that the trial court did not err in ordering copies to be made of the corporate records. CASE's tenth point is overruled.

Finally, we address CASE's eleventh point of error in which it asserts the trial court judgment is "not sufficiently definite and certain to define and protect the rights of the parties." More specifically, CASE contends the judgment does not define which documents may be inspected, which documents may be copied, and which documents are covered by which statute.

As we have sustained CASE's sixth point of error challenging the applicability of Article 1396-2.23A and its fourth point of error concerning Joe Cook, our discussion is limited to the relief accorded the Boltzes under Article 1396-2.23. We conclude that an examination of the Boltzes' motion for summary judgment, the trial court's order granting the summary judgment and the statute make clear the compliance required of CASE under the judgment.

In their motion for summary judgment, the Boltzes sought a judgment declaring them "entitled under [Articles 1396-2.23 and -2.23A] to inspect and copy all documents requested from [CASE]." The trial court granted the motion including "all relief sought thereby" subject to its September 30, 1992 protective order. When read together with the provisions of the protective order and the Article 1396-2.23(B) language extending a member's

right of inspection to "*all* books and records of a corporation," (emphasis added), and considering our interpretation that the right to inspect includes the right to copy at the member's expense, the judgment is sufficiently definite.

Parenthetically, our sustention of CASE's sixth point and our holding that a fact question exists as to whether CASE might be entitled to an exemption under Article 1396-2.23A does not require reversal of the summary judgment insofar as it applies to the Boltzes. Article 1396-2.23A, by its terms, applies to the *public's* right to inspect the financial records and annual reports of a nonprofit corporation subject to the exemptions provided in that statute. *See* Tex. Rev. Civ. Stat. Ann. art. 1396-2.23A Comment of Bar Committee (Vernon 1980) (emphasis added). On the other hand, Article 1396-2.23, by its terms, applies to a member's right of inspection. Since we have held the summary judgment evidence was sufficient to establish the Boltzes' status as members of CASE at the time the inspection request was made, that is the applicable statute. That being the case, the existence of a fact question in connection with an exemption under Article 1396-2.23A is immaterial and does not require reversal of the judgment. *Borg-Warner Acceptance Corp. v. C.I.T. Corp.*, 679 S.W.2d 140, 144 (Tex.App. – Amarillo 1984, writ ref'd n.r.e.).

That portion of the trial court's judgment granting the Boltzes the relief they sought is affirmed. The portion of the judgment purporting to grant Joe Cook such relief

is reversed and that portion of the suit is severed and remanded to the trial court. Tex. R. App. p. 81(c).

John T. Boyd
Justice

Publish.

APPENDIX 2

Citizens Association for Sound Energy (CASE), Appellant	§	From the 116th District Court of Dallas County
	§	July 26, 1994
v. No. 07-93-0226-CV	§	Opinion by Justice Boyd
David and Barbara Boltz and Joe Cook, Appellees	§	

JUDGMENT

This cause came on to be heard on the transcript of the record and the same being inspected and it appearing to the Court that there was error in the judgment, it is therefore ordered, adjudged and decreed that the portion of the judgment granting the Boltzes the relief they sought is affirmed, and that portion of the judgment purporting to grant Joe Cook such relief is reversed and that portion of the suit is severed and remanded to the trial court.

It is further ordered, adjudged and decreed that one-half of the costs be taxed against appellant Citizens Association for Soundy [sic] Energy (CASE), and one-half against appellees David and Barbara Boltz and Joe Cook, for which let execution issue.

It is further ordered that this decision be certified below for observance.

APPENDIX 3

NO. 07-93-0226-CV

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL D

NOVEMBER 1, 1994

CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE), APPELLANT

V.

DAVID AND BARBARA BOLTZ AND JOE COOK, APPELLEES

FROM THE 116TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY,

NO. 89-8439-F;
HONORABLE FRANK ANDREWS, JUDGE

Before REYNOLDS, C.J., and BOYD and POFF, JJ.

ON MOTION FOR REHEARING

After careful examination of CASE's motion for rehearing, we remain convinced that our original disposition of this case is correct, with the exception of the modification set out below. However, we will discuss portions of CASE's motion in further explication of our disposition of the case.

Initially, CASE challenges our holding in our original opinion that Article 1396-2.23 of the Texas Revised Civil Statutes Annotated (Vernon 1980 & Supp. 1994) is constitutional as applied by the trial court. On original submission, CASE challenged the constitutionality of Article 1396-2.23 "as applied." It now argues, however, that "either the statute is constitutional or it is not." In making this contention, CASE fails to recognize the long line of authority from the courts of this state, as well as the federal courts, which applies the rules of standing to constitutional challenges to statutes.[1] *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Texas Ass'n of Business v. Air Control Board*, 852 S.W.2d 440, 444 (Tex. 1993); *Santikos v. State*, 836 S.W.2d 631, 633 (Tex.Crim.App. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 600, 121 L.Ed.2d 537 (1992). These rules require that a party show that the challenged statute is unconstitutional as to him and his particular situation. *Breeze v. Breeze*, 707 S.W.2d 298, 300 (Tex.App. – Fort Worth 1986, writ dism'd w.o.j.). A corollary of that proposition is that it is not sufficient to show that the statute might be unconstitutional in another situation. *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984); *Breeze*, 707 S.W.2d at 300; *see also McKinney v. Blankenship*, 154 Tex. 632, 282 S.W.2d 691, 695 (1955). Even assuming that CASE has associational standing to assert the rights of its members, *see Texas Dept. of Mental Health v. Petty*, 778 S.W.2d 156, 165 (Tex.App. – Austin 1989, writ dism'd w.o.j.), the trial

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[1] Although many of these cases discuss standing as it concerns a plaintiff's challenge to a statute, the principles are equally applicable to a defendant who has raised a constitutional challenge as an affirmative defense.

court's protective order prevents CASE's members from suffering any injury from the application of Article 1396-2.23. Although there is nothing to show that CASE was authorized to assert the rights of nonmembers (the contributors, consultants, and informants), the court's order serves to prevent injury to the rights of those individuals as well.

We recognize the exception to the traditional requirements of standing which allows a challenge to the facial validity of a statute where its very existence has a chilling effect on First Amendment rights. *Broadrick*, 413 U.S. at 612. However, the overbreadth analysis allowed by this exception is not applied in every case where First Amendment rights are implicated. Nor is it applied where First Amendment rights will not suffer if the constitutionality of the statute is litigated on a case by case basis. *Clements v. Fashing*, 457 U.S. 957, 972 n.6, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). We believe that the above doctrine is applicable in the instant case and, as a result, hold that the rule of standing is applicable to this case.[2]

Appellees next challenge our affirmance of the trial court's finding that the summary judgment evidence revealed the absence of a material question of fact as to the Boltzes' membership at the time of their request for inspection. In addition to our analysis of appellant's third and fourth points on original submission, which we believe to be correct, there is an additional reason why

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[2] Even when applied, the overbreadth analysis does not demand that a statute "be stricken for marginal prospects of unconstitutional application." *Ferguson v. Estelle*, 718 F.2d 730, 734 (5th Cir. 1983).

appellant's challenge must fail. In opposition to the Boltzes' motion for summary judgment and supporting affidavits showing that they were members of CASE and entitled to the benefits of Article 1396-2.23, appellees (sic) filed a response and its own motion for summary judgment. In that motion, appellees (sic) asserted, as relevant here, that (1) "[CASE] denies that [the Boltzes] *are* members, (2) "[the Boltzes] are not *current* members of CASE," (3) "none of the Plaintiffs are *current* members of CASE," and (4) "a material issue exists [as to] [w]hether Plaintiffs *are* member (sic) of CASE." (emphasis added).

Regardless of whether CASE intended to raise the question of the Boltzes' membership at the time of their request for inspection, it is clear that it failed to raise the issue in its motion for summary judgment or its response to the Boltzes' motion. The only question raised by these documents was the irrelevant issue of the Boltzes' membership at the time the motions were made. Issues not expressly set out in a motion, an answer, or other response shall not be considered on appeal as grounds for reversal. Tex. R. Civ. P. 166a(c).

CASE next contends that application of our original holding to paragraph two of the trial court's protective order permits the Boltzes to inspect CASE's financial activities through the year 1992.[3] As paragraph two is directed at the inspection rights provided by Article

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[3] Paragraph two provides:
2. Plaintiffs David and Barbara Boltz and Joe Cook shall be entitled to inspect the books and records of financial activities and annual reports of the financial activity of CASE for the years 1988, 1989, 1990, 1991 and 1992.

1396-2.23A and because we have held that a question of fact exists as to CASE's entitlement to an exemption order that article, its position to that extent is well taken and that portion of the motion for rehearing granted. We have examined CASE's remaining challenges to our original opinion and find that they are adequately addressed in that opinion. With the exception stated above, appellant's motion for rehearing is overruled.

Accordingly, the portions of the trial court judgment pertaining to paragraph two and purporting to grant Joe Cook relief are severed and reversed and remanded to the trial court. The remainder of the judgment after the severance of these portions is affirmed. Our original judgment dated July 26, 1994 is withdrawn.

John T. Boyd
Justice

Publish.

APPENDIX 4

Citizens Association for Sound Energy (CASE), Appellant	§	From the 116th District Court of Dallas County
	§	November 1, 1994
v. No. 07-93-0226-CV	§	Opinion by Justice Boyd
David and Barbara Boltz and Joe Cook, Appellees	§	

JUDGMENT

The Court's judgment rendered July 26, 1994 in this cause is withdrawn and, in lieu thereof, the following judgment is rendered:

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore ordered, adjudged and decreed that the portions of the trial court judgment pertaining to paragraph two and purporting to grant Joe Cook relief are severed and reversed and remanded to the trial court. The remainder of the judgment after the severance of these portions is affirmed.

It is further ordered, adjudged and decreed that one-half of the costs be taxed against appellant Citizens Association for Soundy [sic] Energy (CASE), and one-half against appellees David and Barbara Boltz and Joe Cook, for which let execution issue.

It is further ordered that this decision be certified below for observance.

APPENDIX 5

[SEAL]

COURT OF APPEALS

Seventh District of Texas
Potter County Courts Building
501 Fillmore, Suite 2-A
Amarillo, Texas 79101

CHARLES L. REYNOLDS
Chief Justice

CARLTON B. DODSON
Justice

JOHN T. BOYD
Justice

H. BRYAN POFF, JR.
Justice

PEGGY CULP
Clerk

MAILING ADDRESS
P.O. Box 9540
79105-9540

(806) 342-2650

November 28, 1994

Mr. Randy Roberts
Blalack & Williams
Williams Square East
5221 N. O'Connor, Ste. 834
Irving TX 75039-3733

Mr. Edward B. Cloutman, III
Law Offices of Edward B.
Cloutman, III
3301 Elm Street
Dallas TX 75226-1637

Gentlemen:

In the case, No. 07-93-0226-CV, styled CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE) V. DAVID AND BARBARA BOLTZ AND JOE COOK, from the 116th

District Court of Dallas County, the Court this day overruled Appellant's Second Motion for Rehearing, of which you will please take due notice.

Very Truly yours,

/s/ Peggy Culp
Peggy Culp, Clerk

/PH

XC: Honorable Frank Andrews, Judge
Mr. Bill Long, Clerk
Texas Lawyers Weekly Digest
Opinion Service
The Texas Lawyer
LEXIS
West Publishing Company
Matthew Bender
Curtis Hill Publishing

APPENDIX 6

[SEAL]

THE SUPREME COURT OF TEXAS

Orders Pronounced May 11, 1995

THE FOLLOWING APPLICATIONS FOR WRIT OF ERROR ARE DENIED.

95-0034 CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE) v. DAVID BOLTZ and BARBARA BOLTZ; from Dallas County; 7th district (07-93-00226-CV, 886 SW2D 283. 07-26-94)

APPENDIX 7

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 11, 1995

Mr. Randy L. Roberts
Blalack & Williams
5221 N. O'Connor Blvd.,
Suite 834
Irving, TX 75039-3733

Mr. Edward B. Cloutman, III
Law Ofc of
Edward B. Cloutman, III
3301 Elm Street
Dallas, TX 75226-1637

RE: Case Number 95-0034
Style: CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE)
v.
DAVID BOLTZ and BARBARA BOLTZ

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

APPENDIX 8

[SEAL]

THE SUPREME COURT OF TEXAS

Orders Pronounced August 1, 1995

THE FOLLOWING MOTIONS FOR REHEARING OF APPLICATIONS FOR WRIT OF ERROR ARE OVERRULED:

95-0034 CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE) v. DAVID BOLTZ and BARBARA BOLTZ; from Dallas County; 7th district (07-93-00226-CV, 886 SW2D 283, 07-26-94)

APPENDIX 9

(SEAL) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 1, 1995

Mr. Randy L. Roberts
Blalack & Williams
5221 N. O'Connor Blvd.,
Suite 834
Irving, TX 75039-3733

Mr. Edward B. Cloutman, III
Law Ofc of
Edward B. Cloutman, III
3301 Elm Street
Dallas, TX 75226-1637

RE: Case Number 95-0034
Style: CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE)

v.

DAVID BOLTZ and BARBARA BOLTZ

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

APPENDIX 10

NO. 89-8439-F

DAVID AND BARBARA BOLTZ, EARL AND ALMA BURNHAM (SIC), CHARLES AND BETTY BRINK, CHARLES AND BETTY CRABTREE, KAY C. TAEBEL, and JOE COOK	§	IN THE DISTRICT COURT
vs.	§	DALLAS COUNTY, TEXAS
CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE)	§	116TH JUDICIAL DISTRICT

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Came on for consideration, Plaintiffs' Motion for Summary Judgment and after having reviewed the pleadings and arguments of counsel, the Court is of the opinion that said Motion is well taken and it is therefore

ORDERED, ADJUDGED and DECREED that:

1. Plaintiffs' Motion for Summary Judgment is hereby sustained.

2. Defendant's Motion for Partial Summary Judgment is hereby overruled.

3. Plaintiffs shall be allowed to inspect and copy documents pursuant to a Protective Order to be drafted by defendant for such purposes.

SIGNED this the 30th day of December, 1991.

/s/ Frank Andrews
JUDGE PRESIDING

APPENDIX 11

NO. 89-8439-F

DAVID AND BARBARA BOLTZ, ET AL.	§	IN THE
	§	DISTRICT
	§	COURT
v.	§	
CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE)	§	DALLAS
	§	COUNTY, TEXAS
	§	
	§	116TH JUDICIAL
	§	DISTRICT

AMENDED PROTECTIVE ORDER REGARDING RECORDS TO BE INSPECTED AND/OR COPIED

It is hereby ordered that the inspection and/or copying of documents conducted by Plaintiffs pursuant to the Order Granting Plaintiffs' Motion for Summary Judgment entered on December 31, 1992, shall be subject to the following conditions:

1. Plaintiffs David and Barbara Boltz shall be entitled to inspect the books and records of account maintain by CASE, and shall also be entitled to inspect the minutes of the proceedings of the members, board of directors, and committees of CASE. The documents covered by this paragraph 1 shall be limited in time to the period beginning January 1, 1988, and ending on August 12, 1989. Plaintiff Joe Cook, having made no claim as a member of CASE, is not entitled to inspect the records covered by this paragraph 1, and Plaintiffs David and Barbara Boltz shall not, either directly or indirectly, reveal to Plaintiff Joe Cook or to any other person, group, or entity, the information or content of any of the records covered by

this paragraph 1. Neither Plaintiffs nor their counsel will use any of the documents provided by CASE under this Order in any other litigation against CASE, or any of its officers or directors either in a personal or professional capacity.

2. Plaintiffs David and Barbara Boltz and Joe Cook shall be entitled to inspect the books and records of financial activities and annual reports of the financial activity of CASE for the years 1988, 1989, 1990, 1991 and 1992.

3. The records specified above in Paragraphs 1 and 2 shall be inspected by Plaintiffs only at the office of CASE, located at 1813 Balboa, Suite 200, Dallas, Texas 75244. Such examination shall take place during the hours of 9:00 a.m. and 5:00 p.m. on consecutive business days specified in writing by Plaintiffs not to exceed three (3) and mutually agreed to in writing by CASE at least 30 days prior to such examination.

4. Within twenty-four hours after completion of the examination of the records by Plaintiffs, they shall designate in writing the specific records which they wish to have copied. Copies of such designated records shall be furnished by CASE to Plaintiffs. Plaintiffs shall pay the reasonable cost of labor and copying, at the commercial rate charged by firms in the Dallas area specializing in reproduction of documents, to be paid prior to receipt of the copies. Defendant CASE reserves the option to make copies at this commercial rate or to contract for copies at the commercial rate. The copies shall be furnished to Plaintiffs, at their attorney's office, within 10 days of payment. Provided that the preceding labor and copying

costs are paid, Defendant shall provide Plaintiffs with a list of documents provided. Each document on such list shall be marked with a Bates numbering stamp and so listed. All documents shall be signed for by a representative of Plaintiffs acknowledging receipt of the documents.

5. Notwithstanding any other provision of this Order or the Order Granting Plaintiffs' Motion for Summary Judgment, Plaintiffs shall not be entitled to examine or copy any records revealing the identities of CASE's members, contributors, consultants, or confidential sources of information.

6. All copies of records furnished by CASE pursuant to this Order shall be maintained exclusively at the office of Plaintiffs' attorney, Edward B. Cloutman, III. Such copies shall not be examined or inspected by anyone other than Plaintiffs and their attorney. Plaintiffs shall have no right to make additional copies. Plaintiffs shall not modify, alter, or amend the documents in any way. The content of all such records, including all information contained therein, shall not be disclosed by Plaintiffs or Plaintiffs' attorney to any other person or entity.

7. If this Order is violated by Plaintiffs, all documents and copies previously produced by CASE to Plaintiffs under this Order shall be immediately returned to CASE.

SIGNED this the 30th day of September, 1992.

/s/ Frank Andrews
JUDGE PRESIDING

APPENDIX 12

NO. 89-8439-F

DAVID AND BARBARA BOLTZ, EARL AND ALMA BURNHAM (SIC), CHARLES AND BETTY BRINK, CHARLES AND BETTY CRABTREE, KAY C. TAEBEL, and JOE COOK	§	IN THE DISTRICT COURT
	§	DALLAS COUNTY, TEXAS
	§	116TH JUDICIAL DISTRICT
vs.	§	
CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE)	§	

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT (NUNC PRO TUNC)

This Court having heard Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Partial Summary Judgment, together with all supplemental filings in connection therewith and the arguments and authority of the parties' counsel,

GRANTS Plaintiffs' Motion for Summary Judgment and all relief sought thereby.

DENIES Defendant's Motion for Partial Summary Judgment and all relief sought thereby, as per the Order of December 30, 1991.

The Court having further reviewed the Defendant's Motion for Reconsideration of Summary Judgment, for Modification of Order Granting Summary Judgment or

Alternatively for New Trial and finding defendant not entitled to same,

DENIES Defendant's Motion for Reconsideration of Summary Judgment, for Modification of Order Granting Summary Judgment or Alternatively for New Trial.

The Court is further of the opinion that the

GRANTING of Plaintiffs' Motion for Summary Judgment leaves only the issue of plaintiffs' request for attorney's fees and costs remaining in terms of relief sought by plaintiffs and further that the

DENIAL of Defendant's Motion for Partial Summary Judgment denies all relief sought by defendant's counter/cross-claim and therefore disposes of all claims and defenses of defendant.

The Court has entered an Order requiring production of documents and protection from disclosure on September 30, 1992.

The Court has set trial on the remaining issues, being the plaintiffs' request for attorney's fees and costs, for November 23, 1992 at 9:30 a.m.

SIGNED this the 23rd day of November, 1992.

/s/ Frank Andrews
JUDGE PRESIDING

ENDORSEMENT ON INSTRUMENT NO. 89-8439-F
David Boltz et al
vs.
Citizens Association for Sound Energy
ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
(NUNC PRO TUNC)
Signed and Entered: November 23, 1992
Recorded in Vol. F 173, page 124
IN THE MINUTES OF THE 116TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS.

APPENDIX 13

NO. 89-8439-F

DAVID AND BARBARA BOLTZ, EARL AND ALMA BURNHAM (SIC), CHARLES AND BETTY BRINK, CHARLES AND BETTY CRABTREE, KAY C. TAEBEL, and JOE COOK,	§	IN THE DISTRICT COURT
	§	OF DALLAS COUNTY, TEXAS
	§	116TH JUDICIAL DISTRICT
Plaintiffs,	§	
v.	§	
CITIZENS ASSOCIATION FOR SOUND ENERGY (CASE)	§	
Defendant.	§	

FINAL JUDGMENT

On December 30, 1991, this Court entered an Order Granting Plaintiff's Motion for Summary Judgment.

On November 23, 1992, this Court entered an Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Partial Summary Judgment (Nunc Pro Tunc).

On August 4, 1992, the Court entered a Protective Order Regarding Records to be Inspected and/or Copied.

On September 30, 1992, the Court entered an Amended Protective Order Regarding Records to be Inspected and/or Copied.

On November 23, 1992, came on for trial all issues not previously resolved through such orders.

After hearing the evidence and arguments of counsel, and reviewing the pleadings in this case, the Court is of the opinion that Plaintiffs are not entitled to recover attorneys fees in this matter.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing with respect to the their claim for attorneys fees.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the terms of the Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Partial Summary Judgment (Nunc Pro Tunc) entered on November 23, 1992, and the Amended Protective Order Regarding Records to be Inspected and/or Copied entered on September 30, 1992 are otherwise adopted and incorporated as the Final Judgment in this case.

All costs of court are taxed against Defendant.

All relief not expressly granted herein is denied.

Date: April 9, 1993

/s/ Frank Andrews
JUDGE PRESIDING

APPROVED AS TO FORM:

/s/ Edward B. Cloutman, III
Edward B. Cloutman, III
State Bar No. 04411000

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ATTORNEY FOR PLAINTIFFS

/s/ Randy Roberts
Randy Roberts
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ATTORNEY FOR DEFENDANT